

HISTORICAL, CULTURAL AND BURIAL SITES

TECHNICAL WORKING GROUP

COMMENTS TO THE PLENARY GROUP

MISSOURI RIVER 2006 SPRING RISE

Disclaimer: This report is solely the product of the Historical, Cultural and Grave Sites Technical Working Group of the Missouri River 2006 Spring Rise Plenary Group. Nothing in this report may be construed to convey an official position of all affected Missouri River Tribes on this matter. Such positions can only be arrived at through government-to-government consultation.

SECTION I BACKGROUND

Given current drought conditions and lack of information available today, it is impossible to make a rational analysis of sacred, cultural and historic resource impacts of various spring rise proposals with any specificity. Therefore, we must recommend no 2006 Spring Rise. Because of current low water levels in the main stem dams, there may not be enough water in 2006 to implement the spring rise program without endangering municipal water intakes sacred, cultural and historic resources. It is also clear that as reservoir levels recede, impacts and cost associated with cultural and historic resources will increase exponentially. While additional research and surveying is necessary to specify exact impacts on specific sites, it is incontrovertible that any reduction in elevation beyond existing levels will expose and damage a large number of sites on the National Historic Registry and sites eligible for the Registry.

The proposed 2006 spring rise is a federal undertaking, which would trigger Corps responsibility to comply with:

- Treaties and the Federal responsibility;
- Number of Federal Laws;
- Executive Orders;
- Memoranda of Agreement; and
- The 2004 Programmatic Agreement with the United States Army Corps of Engineers,

all of these authorities address protection and preservation of historic, sacred, cultural, and natural resources. See Appendix A for a brief explanation of the key provisions of the law.

Rights to Missouri River water are part of the treaty rights of Native American Tribes that historically were or are along the river. These rights are judicially established by the United State Supreme Court in the Winters Doctrine of 1908. In assuming management responsibility and control of Missouri River water, the Corps has assumed and acknowledges a trust responsibility for Multiple Tribal resources. As the Corps itself recognizes, **“The Federal Indian trust responsibility is a legally enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaskan Native tribes.** In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings with the United States and the Tribes.”-Northwestern Division Native American Program Desk Guide p. 3.

The essence of a trust responsibility is that the tribal resources, must be manage for the benefit of the affected Tribes. The 2004 PA which was signed by many of the river tribes describes all laws, regulations, rules, executive orders, MOAs and protocols for which the Corps has compliance responsibility to protect sacred, cultural and historic resources whenever a proposed project or undertaking is being considered which has the potential to impact such resources. All of the protocols in the 2004 PA are predicated on the trust responsibility the CORPS has to the

Tribes on the Missouri River, a legal discussion of protocols which is included in appendix B in order to meet its trust responsibility to Tribes, the Corps must:

- A. Comply with provisions outlined in the 2004 PA;
- B. Ensure safe and easy access to the shoreline so as not to impede the continuity of ancient spiritual ceremonies, see appendix C for relevant provisions (Executive Order 13007 and American Indian Religious Freedom Act of 1978 (AIRFA));
- C. Ensure access for socioeconomic uses of Missouri River; and
- D. Plan for and provide adequate funding (including travel, consultation, and other needs) to ensure effective tribal participation in Missouri River restoration and recovery effort.

The protection of cultural and historic resources is a national issue. All cultural and historic resources, associated with the history of both tribal and non-tribal groups, require protection on all areas of the Missouri River, including the Missouri National Recreational River.

Fluctuating water levels in the reservoirs clearly have widespread and significant impacts to sacred, cultural and historic resources. See the preamble of the PA (appendix B) for critical information on the adverse effects such as, looting activities, degeneration of medicinal plants habitat, shoreline erosion, and water quality. As noted above, there is a distinct lack of useful data to make rational decisions about a spring rise. Further research, (Note: research parameters are determined through consultation pursuant to the 2004 PA), is clearly needed to accurately determined impacts to cultural and historic resources. This will be discussed in greater detail in section II, recommendations of this document.

SECTION II RECOMMENDATIONS

RECOMMENDATION 1: NO SPRING RISE FOR 2006.

Given current drought conditions and the lack of information available today, it is impossible to make a rational analysis of cultural and historic resource impacts of various Spring Rise proposals. Therefore, we must recommend no 2006 Spring Rise unless if there is sufficient precipitation to raise the reservoirs to acceptable levels that will be agreed upon by Indian Tribes, THPO's, SHPO's, and interested parties. If there is sufficient precipitation to maintain or increase existing water elevations on the Reservoirs, the Historical/Cultural and Burial Working Group can support a Spring Rise for 2006 with the following provisions:

- Full compliance with the 2004 PA and Trust responsibility to Affected Tribes, as discussed above. The Spring Rise is a Federal undertaking, which triggers pre-decisional consultation requirements with all affected Tribes in the PA.
- Stop protocols will be developed pursuant to existing Federal laws, such as NAGPRA which requires any projects to halt work in the event that a burial is exposed.
- Stop protocols developed both system-wide and by individual reservoirs, to protect municipal water intakes, for example a stop protocol for Lake Sakakawea would be 1816 MSL.
- No new exposures of submerged historic, cultural, and sacred resources. Looting (and attendant costs) increase exponentially with receding shorelines.
- Spring rise alternatives that have the least effect on reservoir pool levels are preferable for protection. Under increasing drought conditions, the amount of water released for a spring rise must be reduced accordingly.

RECOMMENDATION 2: Missouri National Recreation River (MNRR) provide a stage model based on cross section markers in the 39 mile and 59 mile stretches of the MNRR above and below Gavin's Point Dam.

- Will provide data on water levels at specific points on the river for various spring rise scenarios.
- Determine impacts to specific sacred, cultural, or historic sites.

RECOMMENDATION 3: Adequate monitoring, enforcement and in-situ protection of sacred, cultural and historic sites and human burials. Pursuant to the PA's consultation protocols, the affected tribes and other interested parties will develop a monitoring plan specific to a spring rise.

- Identify new, additional funding sources to implement this recommendation.

RECOMMENDATION 4: Site specific monitoring– The proposed spring rise may have adverse effects on specific locations that can be narrowly delineated. We suggest using aerial photographs taken before and after the spring rise to monitor the effects on these specific locations, for example:

- Extant sandbars in the MNRR should be monitored to determine the effect of the spring rise on the man-made sandbars. Future construction should be halted within the limits of the MNRR until it is determined whether the spring rise will damage the man-made sandbars or perhaps naturally create suitable habitat.
- The newly constructed Ft. Yates intake on the Standing Rock Sioux Reservation is directly downstream from a delta deposit. This deposit should be monitored to determine the effects of the spring rise. If the delta deposits are mobilized and endanger the intake, remedial steps will have to be taken.

RECOMMENDATION 5: Conduct new traditional cultural property and intensive archaeological surveys on all Omaha District Corps lands to create a useful database for rational analysis of impacts of a 2006 spring rise. Inventories should be conducted pursuant to 36 CFR Part 800. A Possible source of data for 2006 projections of reservoir elevations as this will determine effect of the spring rise. Include data from State, Federal sources, including THPO/SHPO, NPS and BIA.

RECOMMENDATION 6: Adverse effect to sacred, cultural and historic resources be avoided and/or mitigated through shoreline stabilization, the use of geo-textile fabric and other preservation methods prior to or caused by a spring rise.

RECOMMENDATION 7: A culturally based risk assessment must be conducted in consultation with affected Tribes and interested parties:

- To determine or assess risk and potential effects to sacred, cultural, historic, and human resources.
- This risk assessment must be developed in consultation, to include necessary funding needs, with affected Tribes and interested parties.

RECOMMENDATION 8: In order to develop rational, fact based analyses of impacts to sacred, cultural and historic resources, and to achieve consensus among affect Tribes, the work of the Historic/Burial working group should continue. This work would of course need to be adequately funded to ensure effective participation of all affected Tribes.

SECTION III – CLOSING STATEMENT

“Federal lands managed by the Corps (both within and outside reservation boundaries) include places that hold religious and cultural importance of the Tribes, and some of these places are crucial for the cultural identities of the Tribes and, as such, for the survival of the Tribes as distinct peoples. Some of these places contain the graves of ancestors and funerary objects, in which Federal law recognizes the right of lineal descendants and culturally affiliated Tribes to take custody in the event that they are removed from the Earth. The Tribes expect the Corps to treat these sacred and cultural significant places as subject to the Federal trust responsibility.”

2004 Programmatic Agreement with the
U.S. Army Corps of Engineers